Concord Services, Inc., DB Command Services of Indiana, Inc. and DB Command Services, Inc., Joint Employers *and* Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent). Case 13–CA–28603

March 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Exceptions filed to the judge's decision in this case[1] raise the issue of whether the General Counsel in proving allegations that the Respondents, as successor employers, unlawfully refused to recognize and bargain with the Union had the burden of establishing that the Union possessed majority status at the time the predecessor initially granted recognition.

The Board has considered the exceptions in light of the record and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Based on his review of the record here, the judge found that the Union never enjoyed majority status in the collective-bargaining unit in which it demanded recognition from the Respondents as successor employers. The judge therefore concluded that the Respondents did not, as alleged, violate Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. For the reasons set forth below, we find that in this case the judge improperly allocated to the General Counsel the burden of ''affirmatively'' demonstrating the Union's majority status and we find that the Respondents violated the Act by refusing to recognize and bargain with the Union.

The evidence shows that Chesire Delivery Systems, Inc. (Chesire) had been a carrier of hospital and medical supplies in the Chicago area. The Union filed a lawsuit against Chesire in 1986 alleging that it was a successor and alter ego of Dependable Parcel Co. with which the Union had a collective-bargaining relationship. Chesire filed for bankruptcy about March or April 1988. In September 1988, Paul Glover, the Union's vice president and general counsel, initiated efforts to settle the litigation. Glover told Chesire's president, Richard Marszalek, that they could resolve the pending litigation if Chesire would negotiate a collective-bargaining agreement with the Union covering a unit of drivers and dockmen. Marszalek agreed to bargain if the Union could prove majority status.

Thereafter, Glover instructed the Union's organizers to solicit authorization cards from Chesire's drivers and dockmen. Glover subsequently received nine signed cards. After personally talking to Chesire's drivers and dock personnel while verifying these signatures, Glover determined that there were 17 employees in the bargaining unit that the Union sought to represent. Glover presented the cards to Marszalek who then conducted his own investigation of the Union's majority status. Marszalek confirmed Glover's claim and agreed to bargain.

Contract negotiations began the day that Glover gave the signed cards to Marszalek and continued over the next 2 or 3 weeks. The parties eventually reached agreement on a contract covering Chesire's drivers and dockmen. Although Glover presented a copy of this collective-bargaining agreement to Marszalek for his signature, Marszalek never executed the contract.

In early 1989, John Rank, president of Intercon Services, Inc., began negotiations with Marszalek to purchase Chesire's assets including equipment and vehicles. Rank established a company known as Concord Services, Inc. (Concord) sometime in 1989 mainly to purchase Chesire's assets. During the negotiations for the acquisition of Chesire, Marszalek told Rank that he had agreed to a contract with the Union but had not yet signed it. Rank said that he was not interested in purchasing Chesire's assets if there was a contract in effect.

Respondent DB Command Services of Indiana, Inc. (Indiana) is engaged in the business of labor leasing, staff leasing, and labor management. Rank, owner of Concord, is also a stockholder in Indiana. On March 3, 1989, Concord and Indiana executed a contract in which Indiana agreed to provide Concord employees to perform such work ''as may be requested by [Concord].'' Indiana then would charge Concord a fee for each leased employee.

Concord purchased Chesire's assets, including its Illinois intrastate route authority, on April 3, 1989. About that time, Don Blary, Indiana's president, met with Chesire's former employees and invited them to remain working at Concord. Chesire employed 12 drivers and 8 dock workers, a total of 20 employees, at the time of the sale. Indiana then hired a majority of Chesire's former employees to work at Concord, which provided uninterrupted delivery service for the predecessor's former customers.[2] On June 1, 1989, Glover sent a letter to Rank, addressed to Concord, stating that the Union represented a majority of the unit employees and requesting bargaining. The Respondents have neither recognized nor bargained with the Union.

[1] On August 19, 1991, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] Blary further testified that Indiana ceased providing employees to Concord as of the beginning of 1990. Concord is now utilizing the services of another company.

The Respondents do not contest the judge's findings that they are joint employers and that they are legal successors to Chesire's operations.[3] It is also undisputed that a majority of the employees that the Joint Employers hired upon commencing operations were the predecessor's former employees.

The judge found, however, that the Respondents had no obligation to bargain with the Union because ''[i]n my opinion, the Union never enjoyed a majority status, whatever date is ascertainable to show majority.'' In reaching this conclusion, the judge stressed the evidence that before Chesire granted recognition to the Union, in *1988*, the Union had obtained 9 signed cards which is less than a majority of the 20 employees Chesire employed in *1989* when Concord purchased its assets. The judge apparently impliedly questioned[4] whether Chesire also did not have 20 employees in 1988, and not 17 as Glover claimed, at the time of initial recognition based on Marszalek's testimony at the hearing that ''[i]f I set a number, I would be guessing'' when asked about the size of Chesire's employment complement in September 1988. Based on his finding that the General Counsel had ''not affirmatively demonstrated'' that the Union ever had majority status in the bargaining unit, the judge without supporting case citation concluded that the Respondents did not violate Section 8(a)(5) by refusing to recognize and bargain with the Union. He therefore dismissed the complaint.

In reversing, we first find that the judge misallocated the evidentiary burden in this case. In this regard, the Board has indicated that:

> [u]nder the Board's well-settled successor employer doctrine approved by the Supreme Court in *NLRB v. William J. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), a successor employer, absent a reasonably based good-faith doubt of the incumbent union's majority, is obligated to recognize the continuing representative status of the bargaining agent of its predecessor's employees in an appropriate bargaining unit taken over from the predecessor. This is so not only where, as in *Burns*, the incumbent union's representative status was established by Board certification, but also *where it was established by voluntary recognition accorded the [u]nion by the predecessor employer*. The presumptions of continuing majority status that are applicable to the predecessor employer are equally applicable to the successor. Where such a presumption exists and has not been overcome by the requisite kind and degree of proof, the incumbent union need not reestablish its majority status through an election or by a majority card showing in order to support a finding in an 8(a)(5) complaint proceeding that the successor's refusal to recognize and bargain with the union was violative of the Act.[5]

In this case, the Respondent's predecessor accorded voluntary recognition to the Union. Notwithstanding this, and the applicable principles set out above, the judge placed on the General Counsel the burden of affirmatively establishing the Union's majority status. In so doing, he was in error. As the Board stated in *Moisi & Son Trucking*, 197 NLRB 198 fn. 2 (1972):

> Respondent, as a defense to the 8(a)(5) allegation of the complaint, asserts that the General Counsel failed to establish that the Union ever enjoyed majority status. Once an employer has extended voluntary recognition to a union, however, he will not be heard subsequently to challenge its majority status in an 8(a)(5) proceeding unless he introduces affirmative evidence proving a lack of majority at the time of the recognition agreement. No such evidence was adduced by [r]espondent in this case.

Thus, as in *Moisi*, the burden in this case was on the Respondents to affirmatively prove a lack of majority at the time of recognition and not on the General Counsel to prove the existence of a majority.[6] The Respondents failed to sustain that burden in this case. The evidence offered does not affirmatively establish that the Union lacked majority status in September 1988 when Chesire recognized it.[7] Further, the judge was in error in finding no majority status based on the evidence that Chesire's employment complement had reached 20 when Concord purchased its assets on April 3, 1989, more than 6 months after initial recognition. The predecessor's employment complement on the latter date clearly is immaterial to the question of whether the Union enjoyed majority status in September

[3] Although the record does not clearly disclose the relationship between DB Command Services, Inc. and Joint Employers Concord and Indiana, we note that the Respondents do not except to the judge's findings that these three business entities are joint employers here.

[4] The judge's reasoning is not clear on this point.

[5] *Virginia Sportswear*, 226 NLRB 1296, 1300 (1976) (footnotes omitted, emphasis added).

[6] While *Moisi* involved an employer who first recognized a union and then repudiated that recognition and the Respondents here as successors were not the employers who initially recognized the Union, the Respondents' burden was nonetheless the same as the employer's in *Moisi* in order to justify their refusal to bargain with the Union.

[7] As the judge notes, Glover stated he was told by the employees that there were 17 drivers and dockworkers. While the judge stated his ''belief'' that Glover was misinformed by the employees he talked to regarding the size of the unit, the judge offers no rationale for that belief. The fact that Chesire's president, Marszalek, was unsure of how many employees he had does not give credence to the judge's finding that Glover was misinformed as to the size of the unit.

1988 when Chesire initially granted recognition. The Respondents failed to prove that the Union lacked majority status when Chesire recognized the Union in September 1988.[8]

The Respondents did not overcome the presumption of the Union's majority status described in *Virginia Sportswear*, infra at fn. 5. As alluded to above, the Board has further held that in order to justify a refusal to bargain or a withdrawal of recognition a successor employer may also show that on the date of such a refusal to bargain ''the union had in fact lost its majority status . . . *or* that the refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support.''[9] The Respondents offered no evidence that the Union either lacked majority support or that the Respondents had a good-faith doubt that the Union lacked such support in June 1989 when they refused to bargain with the Union.

For the reasons stated above, we conclude that the Respondent Joint Employers as successors to Chesire had a bargaining obligation when the Union sought recognition on June 1, 1989. Accordingly, we find that the Respondents violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union.[10]

CONCLUSIONS OF LAW

1. Concord Services, Inc., DB Command Services of Indiana, Inc. and DB Command Services, Inc., are joint employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondents constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All drivers and dockmen; but excluding office clerical employees, guards, and supervisors within the meaning of the Act.

4. At all times on and after June 1, 1989, the Union has been the exclusive collective-bargaining representative of the employees in the unit described above.

5. The Respondents are successors to Chesire Delivery Systems, Inc. and as of at least June 1, 1989, employed a full complement of employees in the unit found appropriate.

6. On June 1, 1989, the Union made a valid demand for recognition and bargaining, which demand the Respondents refused, and continue to refuse.

7. By failing and refusing on and after June 1, 1989, to recognize and bargain with the Union as the representative of the employees in the appropriate unit, the Respondents have violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act, we shall order them to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondents, Concord Services, Inc., DB Command Services of Indiana, Inc. and DB Command Services, Inc., Joint Employers, Northlake and Lockport, Illinois, and Hammond, Indiana, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All drivers and dockmen; but excluding office clerical employees, guards, and supervisors within the meaning of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) as the exclusive collective-bargaining representative of employees in the appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facility in Northlake, Illinois, copies of the attached notice marked ''Appendix.''[11] Copies

[8] Based on our disposition of the instant case and the fact that the General Counsel has not raised this particular issue, we find it unnecessary to decide whether the application of *Morse Shoe*, 227 NLRB 391, 394 (1976), as modified 231 NLRB 13 (1977), would preclude, in any event, a successor employer from attacking the validity of an initial recognition occurring, as here, more than 6 months before the filing of an 8(a)(5) charge.

[9] *Destileria Serralles, Inc*., 289 NLRB 51 (1988), quoting *Harley-Davidson Co*., 273 NLRB 1531 (1985) (citation omitted).

[10] The Union, as stated, sent a letter to Respondent Concord on June 1, 1989, demanding recognition. The date of that mailing fixes the date of the written demand. *Good N' Fresh Foods*, 287 NLRB 1231 (1988).

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

MEMBER OVIATT, concurring.

I agree with my colleagues and the judge that the Respondents were joint employers and successors to Chesire Delivery Service in 1989.

I find this case particularly troublesome because there is clearly a question of whether this Union ever represented a majority of the predecessor's employees in an appropriate unit. However, as the continuing vitality of *Morse Shoe* was not litigated here, I join the majority and concur in their conclusions and findings.[1]

[1] The evidence indicates that the relationship between Respondent Concord and the employee leasing companies involved here had terminated prior to the hearing in this proceeding. Accordingly, I would permit the parties to raise the matter of the appropriate scope of sec. 2(a) of the Board's Order at a subsequent stage of this proceeding.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) as exclusive bargaining representative of employees in the following appropriate unit:

> All drivers and dockmen; but excluding office clerical employees, guards and supervisors within the meaning of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit on terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

CONCORD SERVICES, INC., DB COMMAND SERVICES OF INDIANA, INC. AND DB COMMAND SERVICES, INC., JOINT EMPLOYERS

Dawn Scarlett, Esq., for the General Counsel.
Joel L. Greenblatt, Esq., for Concord Services, Inc.
Robert R. Benjamin, Esq., for DB Command Services of Indiana, Inc.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried in Chicago, Illinois, on August 15 and 16, 1990. The charge was filed on May 3, 1989,[1] by the Union against Concord Services, Inc. (Concord), Chesire Delivery Systems, Inc. (Chesire), DB Command Services (Services), John Rank, and various other employers. DB Command Services of Indiana, Inc. (Indiana) is not named in the charge. At the hearing, counsel for DB Command Services of Indiana initially took the position that his client was not served with a copy of the charge, while later acknowledging that his client received a copy, although the charge was not directed to his client. At any rate, his answer reflects the receipt of the charge, so due process has been served, albeit sloppily.

The complaint and notice of hearing issued on June 14, 1990, naming as Respondents the employers appearing in the caption of this decision.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent Concord, a corporation with an office and place of business in Northlake, Illinois,

[1] All dates are in 1989, unless otherwise indicated.

[2] In a confusing brief, in the selection captioned ''Statement of the Case'' counsel for the General Counsel states that a complaint issued naming as Respondents ''Concord Services, Inc., DB Command Services of Illinois, and DB Command Services of Indiana,'' as joint employers. The complaint before me does not include the name, ''DB Services of Illinois.'' Testimony clearly reflects, and counsel for the General Counsel concedes, in fn. 3 of her brief, that it is a defunct corporation. The complaint does however name an employer, DB Command Services, Inc., which apparently got lost some place. I do not consider DB Command of Illinois a party to this litigation.

To make matters even more confusing, counsel for the General Counsel in the ''Conclusion and Remedy'' section of her brief asks me to find that Chesire (a bankrupt predecessor) and DB Command of Illinois (now defunct and not named as a Respondent) were successors to Chesire. Moreover, she contends that they are obligated to recognize and bargain with the Union. Fortunately the record, which is clearer than the brief, allows me to render, what I hope is a cognizant decision.

has been engaged in the business of providing common carrier trucking services.

During the past calendar year, Concord, in the course and conduct of its business operations derived gross revenues in excess of $50,000 for the transportation of freight and commodities in interstate commerce pursuant to arrangements with, and as an agent for, various common carriers, including Whiteford Transport Systems, Inc. which operates between and among various States of the United States.

At all times material, Respondent DB Command Services of Indiana, a corporation with an office and place of business in Hammond, Indiana, has been engaged in the business of providing driver personnel to private, common, and contract carriers as an essential link in the interstate transportation of commodities.

During the past calendar year, a representative period, Respondent DB Command Services of Indiana received gross revenues in excess of $50,000.

At all times material, Respondent DB Command Services, Inc.,[3] a corporation with an office and place of business in Lockport, Illinois has been engaged in the business of providing driver personnel to private, common, and contract carriers as an essential link in the interstate transportation of commodities.

During the past calendar year, a representative, DB Command Services, Inc., in the course and conduct of providing services, received gross revenues in excess of $50,000.

Respondents are now, and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(2) and (5) of the Act.

III. THE APPROPRIATE UNIT

The following employees of Respondents constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All drivers and dockmen, but excluding office clerical employees, guards and supervisors within the meaning of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

Chesire Delivery Systems, Inc. (Chesire) was a carrier of hospital supplies within a 5-mile radius of Chicago. As such, it delivered supplies to 130 to 135 hospitals. Some of its customers were Burrough's (pharmaceutical company), Midline Industries, Fisher Scientific, Sanicraft, and others. Chesire differed from the typical general cartage common carrier in that hospitals must have the products delivered by noon on any given day.

As the result of litigation which commenced sometime in 1986, Paul Glover, vice president and general counsel of the Union, met in September 1988, with Richard Marszalek, president of Chesire. Glover advised Marszalek that the litigation could be resolved if Chesire would negotiate a collective-bargaining agreement with the Union for a unit of drivers and dockmen. Marszalek was amenable to bargaining if the Union could prove a majority.

To this end, Glover had union organizers solicit authorization cards from Chesire's drivers and dockmen. Glover obtained nine cards and verified the signatures by personally confronting the signatories to the cards. Moreover, he allegedly was told by the employees that Chesire employed a total of 17 drivers and dockworkers. Glover presented the cards to Marszalek, who had spoken to the cardsigners, and agreed to meet and bargain with the Union.

Contract negotiations ensued, and continued for a period of 2 to 3 weeks. Marszalek testified that Chesire filed for bankruptcy in March or April 1988. Glover furnished Marszalek with a copy of a collective-bargaining agreement, asked him to look it over, and change anything that ''the company could not survive with.''

Negotiations culminated in the parties reaching a collective-bargaining agreement, and incorporating agreed-upon terms into a written copy. Glover presented a copy of the contract to Marszalek for his signature.

After the passage of 7 to 10 days, Glover had not received the executed contract from Marszalek. Glover telephoned him and was told by Marszalek that he was sending a copy of the contract to his lawyer, and that there might be problems because the contract would have to be presented to the bankruptcy court. Marszalek never executed the agreed-upon collective-bargaining agreement.

In the early part of 1980, Marszalek entered into negotiations with John Rank, president of Intercom Services, Inc., to sell Chesire's assets including equipment and trucks to Concord, a company owned by Rank. Rank and Marszalek knew each other because Chesire leased terminal space in one of Intercom's buildings. Accordingly Rank was Marszalek's landlord. During the negotiations between Marszalek and Rank for the purchase of Chesire, Marszalek told Rank that he had negotiated a collective-bargaining agreement with the Union but had not signed it. Rank advised Marszalek that if there was a contract between Chesire and the Union he would not purchase Chesire's assets.

Rank as the sole stockholder, established a company sometime in 1989, known as Concord Services, Inc. Concord was formed to haul freight for Whiteford in interstate and intrastate transportation. By April 1989, Chesire was also engaged in hauling freight for Whiteford. On March 23, 1989, during the bankruptcy proceedings, the Union futilely attempted to have the contract executed. The parties were in bankruptcy court on March 23. Marszalek was not present, but he was represented by an attorney and trustee. The Union was represented by an outside attorney, employed to deal with bankruptcy matters. Rank was represented by Counsel Joel L. Greenblatt. The parties are in accord, and Rank testified that on March 23, 1989, at the bankruptcy court, the Union was still attempting to ''re-negotiate'' a contract with Marszalek's attorney.

[3] Referred to in pars. II(h) and (i) of the complaint as ''db Command.'' There is no answer on behalf of this entity contained in the General Counsel's file of exhibits. There is no answer filed on behalf of ''DB Command Services, Inc.,'' a named Respondent. I therefore am compelled to assume that ''DB Command and DB Command Services, Inc.'' are one and the same.

Concord purchased Chesire's assets, including the Illinois Commerce Commission's authority for intrastate hauling on April 3, 1989. Concord continued uninterrupted to service Chesire's customers.

In early 1989, when Chesire commenced to carry general commodities for Whiteford, 20 to 30 percent of Chesire's business was Whiteford freight. The Whiteford freight was carried with Chesire's hospital freight on the same trucks, with the same employees. By the time Chesire was dissolved, or immediately prior thereto, Whiteford accounted for 30 percent of Chesire's Freight.

Marszalek and dispatcher Ray Villega, who later became a dock supervisor, conducted Chesire's entire operation Villega was the de facto general manager. Marszalek and Villega specifically identified by name, 12 drivers and 8 dockworkers, a total of 20 unit employees, who were employed by Chesire prior to the sale of its assets to Concord. No payroll records were offered into evidence, other than General Counsel's Exhibit 6, which reflects the name of an office clerical employee.

On or about April 3, 1989, Indiana held a meeting with the Chesire employees, where Don Blary, president of Indiana, and a 50-percent stockholder handed out employment applications and invited the former Chesire employees to remain working at Concord. After filling out the appropriate paperwork, employees were hired at the same amount of pay that they received at Chesire. They also continued to work at the same site. John Rank owns the remaining 50-percent stock of Indiana.

A substantial number of employees who formerly worked for Chesire were employed to perform work for Concord. Villega was originally hired at Concord as a dispatcher, but later the job changed to dock supervisor. The defunct corporation, DB Command of Illinois, hired clerical employees and dockworkers who performed work for Concord, while Indiana hired the truckdrivers.

Indiana is a company engaged in the business of labor leasing, staff leasing, and labor management. John Rank, owner of Concord, is also a stockholder in Indiana. On March 3, 1989,[4] Concord and Indiana entered into a written contract wherein Indiana agrees to provide Concord workers to perform duties ''as may be requested by the company (Concord).'' The contract provided that Indiana furnish Concord with employees, in the numbers and job descriptions pursuant to Concord's needs and requests. Indiana agreed to ''instruct'' the employees and to govern their conduct and behavior while performing work for Concord to conform with Concord's issuance of general rules and instructions. Indiana also agreed to be responsible for the supervision of the employees and to ensure compliance with Concord's general rules and instructions. Furthermore, Indiana agreed to honor the wishes of Concord in replacing employees who did not fulfill Concord's requirements.

John Rank's testimony appears to treat Indiana and DB Command, Inc. as a single entity. Counsel for the General Counsel refers to ''the two db Command companies.'' I believe that DB Command Inc. is the named Respondent, DB Command Services, Inc. (Services). The employees are on the payrolls of the ''DB Command'' companies According to Rank's testimony the employees at Concord are hired, disciplined and can be fired by the DB companies. These companies also issue the employees' paychecks according to Rank. Villega testified that the name ''db Command Services'' appeared on his paycheck. The Command companies pay social security, Federal, and state withholding taxes and workmen's compensation for the individuals working at Concord.

Concord is billed a fee for each leased employee. This fee includes the cost of wages and withholding taxes for each leased employee. According to Rank, Concord had the authority to effectively recommend hiring and firing of any employees who performed services for it. Employees punched a timeclock located at Concord's premises and Concord determined the amount of wages to be paid to the employees and their hours of work. Employees did not receive life insurance or vacations unless authorized by Concord. If such an authorization was forthcoming, it would be billed to the DB Command companies. Concord would notify the DB Command companies if the employees needed to be disciplined. Concord set work rules and procedures and directed work assignments. DB companies did not participate in the day-to-day supervision of the employees working at Concord.

Blary, president of Indiana, testified that his company ceased to provide employees to Concord as of the beginning of 1990. Concord is utilizing the services of another company.

On June 1, 1989, Glover, representing the Union, sent a letter to John Rank addressed to Concord stating that the Union represented a majority of Concord's drivers and dockmen. Glover requests that Rank meet and bargain with the Union. Moreover the document advises that the Union possesses authorization cards with signatures of a majority. As of the date of the hearing, neither Rank, Concord, or any of the named Respondents have recognized or bargained with the Union.

Conclusion and Analysis

The record clearly reflects that all the Respondents share control and a common labor policy of the employees.

Concord exercised direct control over the employees compensation and benefits. It determined the employees' wage scales. Concord would have to approve and pay Indiana and Services for any paid vacations requested by the employees if such an occasion occurred. Employees could not avail themselves of life insurance without Concord's sanctions.

Services and Indiana initially hired the employees and could fire the employees.

They also issued their paycheck. Indiana and Services did not exercise any day-to-day control or supervision over the employees. These functions were the responsibility of the leased supervisor. Concord sets hours and work schedules. Concord could reject any employee referred to it by Services or Indiana.

Record facts convince me that all the named Respondents and each of them have ample control over the employee, and their jobs, to qualify them as joint employers. See *Browning-Ferris Industries*, 259 NLRB 148 (1981), and cases cited therein.

The Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and later Board cases, set forth the cri-

[4] Counsel for the General Counsel incorrectly cites the date as 1990

teria to be met for finding a successorship. It is essential that there be a substantial continuity of the employing industry.

Concord is engaged in the same endeavor as Chesire was, i.e., the transportation of freight, out of the same terminal as Chesire. Concord's drivers drove the trucks purchased from Chesire. The drivers and dockworkers were paid the same wages they were paid by Chesire. Chesire's supervisor, Villega, continued to supervise at Concord. Blary, president of Indiana testified that he believed a majority of the Chesire employees were on Indiana's payroll in February 1989, while Chesire was still operating.

Initially, without any transitional period, Concord commenced to haul the identical freight which was carried by Chesire, general commodities, and hospital freight. After approximately 3 months, the transitional phase commenced when Concord began phasing out the hauling of hospital freight. This phase lasted until 6 months later,[5] at which time Concord was hauling general commodities only.

In my opinion, the change in the nature of the freight is not fatal to my finding that Concord is a successor to Chesire, and I so find. The Board affirmed an administrative law judge's finding of successorship where the ''product mix'' was changed. The change was not substantial enough to overcome the successor status. The same principle, in my opinion, is applicable here—freight is freight. Cf. *Louisiana-Pacific Corp.*, 283 NLRB 1079 (1987).

Accordingly, it follows that the joint employers Concord Indiana and Services, should be considered as successors to Chesire, and I so conclude.

Having enunciated the above, I would be remiss in ignoring the fact that the counsel for General Counsel has not affirmatively demonstrated that the Union, at any time represented a majority of employees.

Record testimony by Marszalek, Chesire's president, reflects that Board-conducted election was held among Chesire's unit employees sometime in 1986 or 1987. The Union herein appeared on the ballot. It did not garner a sufficient number of votes to represent a majority of employees.

The next time Marszalek heard from the Union, was when he was contacted by Glover in September 1988. Glover presented him with nine authorization cards. Counsel for the General Counsel, acknowledges in her brief, where she lists Chesire's employees, ''prior to the sale of any assets,'' that 20 employees appeared on the payroll. Indeed, record testimony supports her contention at page 6 of her brief, ''All of the employees referred to above were employed by Chesire up to the date Chesire's assets were sold to Concord.'' She considers the critical date to be April 3, 1983, the date Concord began operation. Assuming arguendo counsel for the General Counsel is correct, and the date of the demand is not the critical date, and assuming that a majority of Concord's work force consisted of former Chesire employees represented by the Union, 9 is not a majority of 20. Nine is not even a majority of 18, the number of employees appearing on General Counsel's Exhibit 9(b) captioned, ''Command Services of Indiana.'' Supervisor Villega was not considered part of the unit. If employee Dugar left prior to the assets buyout, it does not change the Union's minority status.

I believe that Glover, and similarly Marszalek, verified that the signatures on the cards were authentic. I further believe that Glover was misinformed by the employees he talked to, regarding the size of the unit. Moreover, I am convinced that Marszalek, as demonstrated by his testimony on cross-examination, was not certain of how many individuals he actually employed. For example he testified, ''If I set a number, I would be guessing.'' When asked if the number was 15, he responded, 'that would be fairly close.'' When advised that in his earlier testimony he ''listed 20,'' and he was asked if that was close, Marszalek responded affirmatively. His responses were vague at best.

The issue of majority is critical. In my opinion, the Union never enjoyed a majority status, whatever date is ascertainable to show majority. Marszalek bargained, and reached agreement on a collective-bargaining agreement, with a minority representative. Accordingly, Respondents cannot be held, and are not obligated to recognize and bargain with the Union.

I therefore recommend that the 8(a)(1) and (5) allegations of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondents and each of them are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondents and each of them are joint employers.

3. Respondents and each of them are successors of Chesire.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. At no time material herein has the union been the designated exclusive collective-bargaining representative of the employees in the appropriate unit.

6. The allegations of the complaint that Respondents, and each of them, have engaged in conduct violative of Section 8(a)(1) and (5) of the Act have not been supported by substantial evidence.

[Recommended Order for dismissal omitted from publication.]

[5] A period of 9 months from when Concord began operations.